THE INSULAR TARIFF CASES IN THE SUPREME COURT.

THE editors of the REVIEW have delayed the issue of this number until they could obtain from Washington authentic copies of the opinions rendered in the Insular Tariff Cases on May 27 last. There is opportunity now to give only a slight and very imperfect notice of them.

It is fortunate for the country and for the future of our system of constitutional law that the Supreme Court has recognized the essentially political nature of the questions with which the General Government has had to deal in legislating for our new possessions. But it is also matter for regret and anxiety that, in reaching its conclusions, the court should have had so narrow a majority. This fact, and much that is said in these opinions, may well draw sharp attention to the vital and absolutely fundamental distinction between the legislative and the judicial question in cases of the class to which these now under consideration belong. Where our system intrusts a general subject to the legislature, nothing but the plainest constitutional provisions of restraint, and the plainest errors, will justify a court in disregarding the action of its coördinate legislative department, — no political theories as to the nature of our system of government will suffice, no party predilections, no fears as to the consequences of legislative action. In dealing with such questions the judges are, indeed, not acting as statesmen, but their function necessarily requires that they take account of the purposes of statesmen and their duties; for their own question relates to what may be permissible to a statesman when he is required by the Constitution to act, and, in order that he may act, to interpret the Constitution for himself; it is never, in such cases, merely the dry question of what the judges themselves may think that the Constitution means.

Of the half dozen cases, more or less, lately decided, the most important is that of Downes *v.* Bidwell, raising the question of the constitutionality of the Act of Congress which took effect May 1, 1899, providing, temporarily, civil government and a revenue system for Porto Rico. The plaintiff, in the United States Circuit Court for the Southern District of New York, sought to recover

from the collector duties on oranges brought there from the island, which had been paid under protest in November, 1900. The plaintiff lost his case below; and on error to the Supreme Court the judgment was affirmed. In deciding, as they did, that the legislation of Congress was constitutional, the judges stood five to four. They held that, in the absence of treaty provisions, a region acquired by conquest and treaty does not immediately become a part of the United States, in the sense of that provision of the Constitution which requires that duties, imposts, and excises shall be uniform throughout the United States; but that Congress may subject it to such revenue legislation as may seem best; so long, at least, as it is not permanently "incorporated" into the United States.

Implied in this proposition, and in the reasoning employed by all the judges who sustain it, are two or three other general propositions of much importance.

1. As to the political catch which we have been hearing so much, about the Constitution following the flag or not following it, we may collect from all the opinions, including (as to this matter) those of the minority, that wherever the flag is rightfully carried the Constitution attends it. To be sure that is obvious enough. That is to say, no rightful power can ever be exerted under the authority of the United States, which is not founded on the Constitution. But all parts of that instrument are not relevant to all inquiries, or applicable to all situations. And, moreover, the silence of the Constitution and its tacit references and implications, pointing steadily to the usages of other nations, — these go with it, as well as its expressions. The Constitution is not a code of detailed precepts.

2. The United States may acquire territory as the result of war and treaties, without any qualification as to kind or quantity, or as to the character of its population. It may be Canada, or a cannibal island, or an island of slaves and slave owners.

3. The mere acquisition or cession of a region does not "incorporate" it into the United States so as to subject it generally to those clauses of the Constitution which restrain and prohibit certain action by the Congress of the United States; but such regions may be temporarily governed, in some respects, at least, as seems most suitable for their own interests and those of the United States.

4. The question of when these regions shall be "incorporated" into the United States is for Congress.

The majority consisted of Justices Gray, Brown, Shiras, White and McKenna. The minority was made up of Chief Justice Fuller and Justices Harlan, Brewer, and Peckham. These four held that the Act authorizing the duties in question was invalid because not conforming to the constitutional requirement that duties, imposts, and excises shall be uniform throughout the United States, since the treaty, as they held, had instantly "incorporated" Porto Rico into the United States. Such, always and necessarily, in their view, is the operation of a treaty by which the United States acquires a new region. While these judges seem to agree, expressly or tacitly, to the first two of the four general propositions above stated, they deny the second two.

The opinion of the minority was given by the Chief Justice; and there was a separate concurring opinion by Justice Harlan. For the majority three opinions were given, — one, announcing the judgment of the court, by Justice Brown; one for himself, by Justice Gray, mentioning, in passing, that in substance he agreed with Justice White; and one by Justice White, for himself and Justices Shiras and McKenna.

The Chief Justice relies strongly on what he regards as the decision, and not merely a dictum, of Chief Justice Marshall in Loughborough *v.* Blake, that territories are included in the phrase "throughout the United States," in that clause of the Constitution which requires duties to be uniform; and he insists that the territories are covered by the general restraints and prohibitions of the Constitution. The existing legislation for Porto Rico, moreover, seems to him to "incorporate" the island into the United States, and not to be of a temporary sort.

In concurring with this opinion Justice Harlan adds a separate one, enlarging on some points, and replying, with much emphasis, to some matters in the opinions of the majority which were not commented on by the Chief Justice. Among other things, he seems to see in these opinions assertions of a doctrine of State Rights which probably would not be found by the ordinary reader.

Justice Brown, in announcing the judgment of the court,[1] iden-

[1] The learned reader will not need to be reminded that the opinion of a justice who is charged with the duty of rendering the judgment of the court often reaches the common result by a process which is not that of the majority. It is enough to refer to the opinion of Chief Justice Taney in the Dred Scott case, sometimes, *e. g.* by Howard, the reporter, erroneously called the "opinion of the Court." See Thayer's Cases on Constitutional Law, i. 493 n.

tifies the situation of Porto Rico with the original status of all the other "territories," and therefore deals with the general question of the power of the United States over its territories when first acquired. Arguing from the history of the government, its dealings with newly acquired territory through all its departments, and from the cases, he finds the general proposition true that the Constitution deals with and provides for States and not "territories;" in general, therefore, he holds that its prohibitions and restraints upon legislation, including the revenue-uniformity clause, do not extend to the latter. But he reserves the question as to whether some of these provisions do not withdraw from Congress all power to do certain things, in any region whatever. He holds, however, that Congress may extend any part or all of these clauses to the territories; and where once this has been done he declares that it cannot again withdraw their operation. If it be true then, as we believe it is, that this has been done in the case of all our older territories (Rev. St. U. S. s. 1891), the doctrine stated would, on this ground, put our new possessions on a different footing from the present position of all the others.

Justice White finds from his examination of the judicial decisions and administrative precedents, as well as from the history of the government and general principles, that the territories are subject to most of the restraints and prohibitions on legislative power in the Constitution; but that some of them are not applicable to all situations alike. And as regards a region acquired by war and treaty he holds that it can never be incorporated into the United States merely by a treaty; the action of Congress, express or implied, must exist to accomplish that; and pending action of that sort, it may be governed as circumstances require; subject to a few clauses of the Constitution which, as it is conceived, withhold from Congress all power to legislate in certain ways.

Justice Gray, while "in substance agreeing with the opinion of Mr. Justice White," states that the question does not touch the authority of the United States over the "territories" commonly so called, or over Alaska or Hawaii, but concerns only regions gained by war and treaty from a foreign state. As regards such possessions there must necessarily, he says, be a transition period, even after a treaty. From the natural operation of a treaty and from the terms of the one in question it is argued that action of Congress is necessary in order to set up civil government; and, if Congress is not yet ready to deal with the subject finally, it may set up "a temporary government which is not subject to all the

restrictions of the Constitution." The legislation here in question was in his judgment part of such a system and was valid.

In the case of De Lima *v.* Bidwell, a similar action, but relating to duties collected in New York after the treaty and before the Act of Congress, Justice Brown voted with those who were the minority in the case of Downes *v.* Bidwell, and thus gave, in the present case also, the opinion which announced the judgment of the court. The question was whether the Dingley tariff act continued to apply to Porto Rico after the treaty.

The provisions of that Act relate to duties on imports from "foreign countries." Could duties be collected on goods from Porto Rico after the treaty? To deny this, was obviously easy for the four judges who held in the other case that the treaty completely "incorporated" the island into the United States, and subjected it to the general provisions of the Constitution. Justice Brown, who did not think that, agreed with these four on the different but simple and easily intelligible ground of the construction of the Dingley Act, namely, that after the treaty Porto Rico belonged to us, and was no longer a "foreign country" within the meaning of the statute.

The other four judges held that not merely the "political status and civil rights" of the people of the island remained unaffected by the treaty until Congress acted, but also the revenue and customs regulations previously applicable to commerce with them. Justice McKenna gave an opinion for himself and Justices Shiras and White. Justice Gray in five lines simply declared his "dissent from the judgment," as being, in his opinion, irreconcileable with the opinion of the court in Fleming *v.* Page, 9 How. 603, and "the opinions of the majority of the justices in the case, this day decided, of Downes *v.* Bidwell."

Could the continued application of the Dingley law be rested upon the will of the executive, remaining in military control of the island after the treaty as well as before, until Congress should act, it would be easy to agree with the conclusion of these four judges. But of course it cannot; for this is a question of the operation, in New York, of a law dealing only with "foreign countries." To the present writer it seems a very difficult result, to find, either from the terms of this treaty, or from the nature of treaties in general, or from the previous decisions of the court, that Porto Rico should be regarded, after the ratification, as still included within the terms of the Dingley law.

J. B. T.